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No. 06-400

In The
Supreme Court of the United States

ELLIS C. SMITH,

Petitioner,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ORGANIZATION OF VETERANS' ADVOCATES IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Petitioner Smith has consented to the filing of this brief by *amicus curiae* The National Organization of Veterans' Advocates ("NOVA"). Because the Solicitor General, Paul D. Clement, has not responded with consent in writing, NOVA hereby moves, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amicus curiae* brief in support of Petitioner.

The National Organization of Veterans' Advocates ("NOVA") is an organization of attorneys and non-attorney practitioners who devote some or all of their practice to representing those seeking benefits through the federal veterans benefits system, and in particular those seeking judicial review of denials of veterans' benefits.

NOVA's interest in this case evolves from its members' representation before the Department of Veterans Affairs of claimants who are adversely affected by the decision of the Federal Circuit in this matter concerning deference to be afforded to the VA's interpretation of statutes and regulations.

NOVA respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae National Organization of Veterans' Advocates, Inc. ("NOVA"), is an organization of attorneys and non-attorney practitioners who devote some or all of their practice to representing those seeking benefits through the federal veterans benefits system, and in particular those seeking judicial review of denials of veterans' benefits.

NOVA's interest in this case evolves from its members' representation before the Department of Veterans Affairs of claimants who are adversely affected by the decision of the Federal Circuit in this matter concerning deference to be afforded to the VA's interpretation of statutes and regulations.

SUMMARY OF THE ARGUMENT

The correct interpretation of VA statutes and regulations is critical to ensure that veterans obtain the benefits that Congress intended them to have, but the Federal Circuit did not apply the special canons of construction required by this Court for judicial review of VA statutes and regulations. The Petition of Mr. Smith affords this Court the opportunity to clarify and affirm the need for application of the special canons of construction for VA statutes and regulations.

NOVA respectfully submits that the lack of judicial review of VA statutes and regulations for 170 years requires that no deference be afforded to the VA in matters of judicial interpretation of VA statutes and regulations. Statutes and regulations affecting the VA claims adjudication process should be interpreted in the light most favorable to the claimant, resolving every reasonable doubt in favor of awarding benefits.

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[1] This brief is filed with a motion for leave. No part of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

Accordingly, NOVA supports the Petitioner in this case, and urges the Court to reverse and remand the Federal Circuit's judgment.

ARGUMENT

VA STATUTES AND REGULATIONS SHOULD BE INTERPRETED IN THE LIGHT MOST FAVORABLE TO THE CLAIMANT.

A. The Federal Circuit Held That Deference Was Required.

In reaching its decision, the Federal Circuit relied on the general rule fashioned by this Court: an agency's interpretation of its own ambiguous regulation is entitled to substantial deference. *See Smith v. Nicholson*, 451 F.3d 1344, 1349 (Fed. Cir. 2006). An agency's interpretation "is controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 32, 359 (1989)).

B. The Historical Lack of Judicial Review.

For 170 years, veterans' claims for benefits were not subject to judicial review. Lawrence B. Hagel & Michael P. Horan, *Five Years After Veterans Judicial Review Act: The VA Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 Me. L. Rev. 43, 44 (1994). The practice of providing benefits to veterans is older than the Constitution itself. In 1636, members of Plymouth Colony provided support for soldiers who suffered disabling injuries during battle with Native Americans. History of the Department of Veterans Affairs Part 1, http://www.va.gov/opa/feature/history/docs/history/history1.pdf. For a substantial part of the country's history, Congress had a direct role in administering veterans' benefits. *See* William F. Fox, Jr., *The Law of Veterans Benefits: Judicial Interpretation* 3-13 (3rd ed. 2002). In 1930, President Herbert Hoover signed Executive Order 5398 and created the Veterans Administration, which administered the program

of veterans' benefits. *See Fact Sheet*, U.S. Dep't of Veterans Affairs, Facts About the Department of Veterans Affairs (May 2006) http://www.va.gov/OPA/fact/docs/vafacts.pdf.

Veterans perceived "injustice and arbitrariness" in VA decision-making and began lobbying to change the adjudication system as early as 1952. Hagel & Horan, *Five Years After Veterans Judicial Review Act* 46 Me. L. Rev. at 44. Until 1988, a veteran could not obtain judicial review of The VA's denial of his claim. *See The Law of Veterans Benefits* at 5. The decision of The VA was final. *See* Veterans' Benefit Act of 1957, Pub. L. No. 85-56, § 211(a), 71 Stat. 83, 92 (1957). In *Johnson v. Robison* this Court held that, although the statute prohibited judicial review of the decisions of the Administrator, it did not bar judicial consideration of claims challenging the constitutionality of the statute itself. 415 U.S. 361, 367 (1974). However, this did not afford judicial review to veterans of how the VA interpreted VA statutes or regulations. In 1988 Congress recognized the need for limited judicial review and passed the Veterans' Judicial Review Act of 1988, which created the United States Court of Appeals for Veterans Claims as an Article I court. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). Thus, it was not until 1988, that judicial review was available for the interpretations made by the VA of its statutes and regulations.

C. Special Canons of Construction.

In 1946 this Court held that ambiguities in statutes providing benefits to veterans must be resolved in the veteran's favor. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). In 1991, this Court suggested that the same rule governs the resolution of ambiguities in VA regulations. *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221, n.9 (1991). In between, this Court decided *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), holding that substantial deference is given to the statutory interpretation by the agency authorized to administer the statute. Thus, a tension exists between the obligation to resolve ambiguities in favor

of veterans and the substantial deference usually afforded to interpretations by an agency authorized to administer the statute.

The Federal Circuit has gone further than *Chevron*, holding that the VA's reasonable interpretation of a statutory provision governs when the law does not directly address the precise question at issue. *Gallegos v. Principi*, 283 F.3d 1309, 1312 (Fed. Cir. 2002). In a case involving direct review by the Federal Circuit of VA rulemaking, the Federal Circuit noted:

> [I]t is a well established rule of statutory construction that when a statute is ambiguous, "interpretative doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed.2d 462 (1994); *see also, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n. 9, 112 S. Ct. 570, 116 L. Ed.2d 578 (1991) (referring to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed.Cir. 1997) ("Certainly, if there is ambiguity in the statute, interpretative doubt is to be resolved in the veteran's favor.") (internal quotations omitted).

NOVA v. Principi, 260 F.3d 1365, 1378 (Fed.Cir. 2001).

Relying on *Chevron* the Federal Circuit concluded that deference to the interpretation by the VA was required simply because the VA's interpretation was reasonable. NOVA urges that the special canons of statutory construction of ambiguous VA statutes and regulations should be applied in judicial review of any interpretation made by the VA. The special canon of construction created by this Court in *Fishgold, King*, and *Gardner* should trump the traditional principles of deference afforded to governmental agencies.

D. Problems With Deference.

The Federal Circuit's decision in this appeal demonstrates the problems inherent in affording deference to the VA when interpreting VA statutes and regulations. NOVA

supports Mr. Smith's petition because his argument would require deference to the interpretation made by the Veterans Court rather than to the interpretation by the VA. However, NOVA's view is that deference should not be afforded to either the VA or to the Veterans Court when they interpret VA statutes and regulations. Instead NOVA urges that the rule of deference is inconsistent with the special canons of construction set by this Court in *Fishgold, King*, and *Gardner*, all supra.

It took Congress 170 years to permit judicial review of VA decision-making in benefit claims. To impose upon the veteran the burden to overcome deference to the VA's interpretations undermines the long delayed right to judicial review. The paramount consideration should be interpreting VA statutes and regulations to grant "every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a) (the VA's statement of policy).

VA statutes and regulations are fundamentally different from all other statutes and regulations. These statutes and regulations were created to benefit those who bore the burden of national defense. The nation's special debt to veterans requires that ambiguities in those statutes and regulations be resolved generously in favor of the veteran, not that the agency's ancient, hand-me-down, acquired but unreviewed wisdom be protected by deference.

CONCLUSION

NOVA urges this Court to grant Mr. Smith's petition for certiorari.

Respectfully submitted,

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